

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

2020 SEP 14 PM 3:25

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS WAYNE DUNN,

Appellant,

No. 54484-9-II

STATEMENT OF  
ADDITIONAL GROUNDS  
FOR REVIEW

I, Douglas Wayne Dunn, have received and reviewed the Opening Brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground #1

This Additional ground is in reference and in addition to the Appellant's Second Assignment of Errors. The trial court erred in excluding evidence relevant to the defense. The Appellant adopts the argument set forth in the Appellant's Opening Brief and respectfully submits the following Additional Grounds:

I. Evidence of the Robin Steeley's prior inconsistent statements were relevant for impeachment purposes.

On direct examination, Robin Steeley stated:

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"Like, it was -- I've never--that's terrifying to have someone say the things he was saying." RP 174-75

On cross-examination, defense counsel asked Robin:

"Q. Okay. So in response to the State's questioning, you indicated something to the effect that you've never had something like this happen to you before?"

"A. This particular situation? No."

"Q. So--

"A. Have I ever had someone threaten me in the past? Yes." RP 194

State's counsel objected to this line of questioning and the Court sustained the objection on relevance grounds. RP 194.

Defense Counsel's rebuttal to the State's objection raised two grounds supporting the relevance of the sought evidence. In addition to the ground raised in the Appellant's Opening Brief, Defense Counsel also raised the issue of the witness' prior inconsistent statement:

"[Defense Counsel] And, Your Honor, Ms. Steeley indicated in direct examination that something about this had never happened before, and then -- so I inquired further and she indicated she's been threatened before. The reason I'm going down this path is, number one, she opened the door on direct examination and, number two, is in regards to Ms. Steeley being a named victim in a previous harassment death threat case

from 2015, 2014 cause number." RP 194-95

The rules of evidence allow for impeachment of a witness' credibility based on evidence of the witness' bias, interest and prior inconsistent statements. This right is guaranteed by the confrontation clause of the Sixth Amendment to the U.S. Constitution. The U.S. Supreme Court in Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974) held that:

"Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination." Id.; 415 U.S. @ 315 (Internal cites omitted).

The Davis court continued:

"[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences to the reliability of the witness."

Id., 415 US @ 318.

Thus, if cross-examination is the sine qua non of the confrontation clause and if the opportunity to impeach is essential to cross-examination, then it follows that the exclusion of evidence which would facilitate the defendant's cross-examination and impeachment of State witnesses effectively deprived the defendant of his right to cross-examine, and therefore his confrontation rights

under the Sixth Amendment.

## II. EVIDENCE OF THE ALLEGED VICTIM'S PREVIOUS INVOLVEMENT IN A DEATH THREAT CASE WAS RELEVANT TO THE DEFENSE'S THEORY THAT THE ALLEGED VICTIM'S FEAR WAS NOT REASONABLE DUE TO THE ALLEGED VICTIM'S UNIQUE SENSITIVITY UNKNOWN TO THE DEFENDANT.

The Appellant's Opening Brief raises this issue in the second assignment of error. The Appellant would like to add some additional authorities which are particularly relevant to this issue.

Albeit dicta, several courts, including the Washington Supreme Court, have anticipated that the particular evidence that the defense sought to introduce would be relevant to this very issue.

In State v. Kohonen, 192 Wash.App 567, 370 P.3d 16 (2016), the Court explained that the test for determining a reasonable reaction to perceived threats is to look at the actual reaction of the audience. Id. 192 Wash.App @ 580. However, the courts have anticipated an exception:

"[T]he only case where there might be a different outcome is where the recipient suffers from some unique sensitivity unknown to the speaker." Kohonen, 192 Wash.App @ 580 (citing State v. Kilburn, 151 Wash.2d 34, at 45 n.3, 84 P.3d

1215 (2004)). (Internal cites to  
Doe v. Pulaski County Special Sch.  
Dist., 306 F.3d 616, 628 (8<sup>th</sup> Cir. 2002)  
omitted).

It was precisely for this reason that the defense sought to introduce evidence of Robin Steeley's victim impact statement in a prior death threat case. RP 195.

#### ADDITIONAL GROUND # 2

I. This additional ground is in reference and in addition to the Appellant's third assignment of error. The Appellant adopts the argument set forth in the Appellant's Opening Brief, and respectfully submits the following additional grounds:

There are 3 statements made by the defendant which are alleged by the state to be threats to kill. RP 344. The first occurred during the defendant's voicemail message to Robin Steeley where the defendant states that: "[Melody Steeley's] life was in danger." Exhibit 4, RP 344. The second statement, chronologically, was a text message to Robin Steeley in which the defendant states: "If it's life in prison that i'm facing then I will make sure it's a life in prison offense." Exhibit 2, RP 344. The third statement was also a text message to Robin Steeley in which the

defendant states: "I am doing nothing more than you are; protecting my home with up to and including deadly force if necessary." Exhibit 2, RP 344.

None of these statements are overt threats to kill. Although the law does not require that a threat to kill be overt, it does require that it be "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to ... take the life of another person." State v. K. Burn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004) (internal cites omitted). See also: State v. Kohener, 192 Wn.App 567, 580 (2016) ("It is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered --- and the greater environment in which the alleged threat was made." (emphasis added)). Context is the key.

A. When viewing the first alleged threat in context, it is clear that the defendant's statement was not a true threat.

Prior to leaving the voicemail to Robin Steeley, Exhibit 4, the defendant and Melody Steeley had a heated conversation about the theft of defendant's property. RP 136-137, 146, 260. The defendant wanted his property back and told Melody Steeley that he would come

get it. RP 260. Melody Steeley responded by stating: "Good luck. You won't make it two feet. My family has got guns." RP 260.

The defendant testified that he was afraid that his attempt to retrieve his property would lead to gunplay based on Melody's statement that her family had guns. RP 263-64. With this context in mind, the defendant sent the voicemail to Robin Steeley in which he stated that Melody's life was in danger. RP 264.

The defendant's statement was made not as a "serious expression of [his] intention ... to take the life" of either Robin or Melody Steeley, but merely as a prediction for "the potential for violence." RP 264. In Kohonen, the Court held that "statements - those expressing a desire for, or prediction of, violence - did not constitute true threats. Kohonen, 192 Wn. App 567, 579, 370 P.3d 16 (2016) (citing State v. Locke, 175 Wn. App 779, 307 P.3d 771 (2013)). Accordingly, the defendant's statement was not a true threat.

Additional proof that the defendant's statement was not a threat to kill is evident in the defendant's very next message to Robin Steeley, Exhibit 2.

Immediately after receiving the voicemail, Exhibit 4, RS responded by stating:

"If someone steals from you, especially a teenager, you call the police and you hold them

accountable. You don't threaten their life or threaten their life or the life of their Mother and friends and family." Exhibit 2.

It was only after receiving this message that the defendant realized that Robin Steeley was misconstruing his voicemail message. RP 267. Immediately, the defendant responded by saying:

First, I did not threaten the life of your child. What I was talking about was legal consequences that you have to face for stealing from me. If you [misconstrued] those threats then I apologize, but she did -- She came into my house and she stole." Exhibit 2.

This statement makes it clear and unequivocal that: (1) the defendant's voicemail message was not intended as a threat to kill Melody or any other person and, (2) it was not reasonable for Robin Steeley to fear that a threat to kill would be carried out. Despite the clarity of the statement, Robin testified that she didn't understand it: "It didn't make a whole lot of sense." RP 180

What is relevant is not whether or not Robin understood the message but whether a reasonable person in the defendant's position would foresee that the message would be interpreted as a serious expression of his intention to kill Melody. State v. Allen, 176 Wn.2d 611, 626, 294 P.3d

679 (2013). It was not reasonable for the defendant to foresee that Robin Steeley would not understand his statements, because the defendant had no prior knowledge of Robin Steeley's mental disability or of the fact that she had undergone seven brain surgeries which left her with the equivalent of a "traumatic brain injury." RP 158, 173, 193, 199-200.

B. The second statement that the State alleges to be a threat to kill is the defendant's statement: "If it's life in prison that I'm facing, then I will make sure it's a life in prison offense." Exhibit 2. RP 344. This statement is not a true threat.

This statement was made in direct response to Robin Steeley's threat in which she states: "If you touch one hair on her I will make sure you spend the rest of your life in prison." Exhibit 2. Obviously, the defendant cannot be sentenced to life in prison for touching a hair on anybody. The defendant's response merely points out this absurdity. RP 272-73. Robin's statement and the defendant's response can only be classified as 'idle talk,' 'puffery' and/or hyperbole.

"[T]he communication must be a serious threat, and not just idle talk, joking or puffery." State v. Kilburn, 151 Wash.2d 36, 84 P.3d 1215 @ 1221 (2004)(citing State v. J.M., 144 Wash.2d 472,

28 P.3d 720 (2001).

The defendant's response is just an abstract statement that does not state a threat to kill directed to any individual or group of individuals. Accordingly, it is not a true threat. See Brandenburg v. Ohio, 395 US 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) ("'The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected by the First Amendment...'"

C. The final statement in which the State alleges is a threat to kill is the defendant's statement: "I am doing nothing more than you are, protecting my home with up to and including deadly force if necessary." Rf 344, Exhibit 2. This statement is neither a true threat nor an unlawful threat of violence.

This statement immediately follows Robin Steeley's statement in which she states: "And trust that I will use my legal Amendment rights and I'm armed and that anyone that enters my home or threatens my family will be treated accordingly." Exhibit 2. The defendant's response here further confirms the intended message in the voicemail, (Exhibit 4), and reiterates the defendant's texts to Robin Steeley, (Exhibit 2), that the only harm that would come to Melody would be a result of 'doing nothing more than ... protecting [his] home with up to and including deadly force, if necessary'.

The defendant's statement is a correct statement

of his rights to self-defense under RCW 9.11.040 and the defendant has the lawful authority to make such a statement. See for example: State v. Aland, 128 Wn.App 511, 517 (2005) ("[U]nder certain circumstances necessary force may include putting a trespasser in fear of physical harm.") The State essentially concedes that a person has the lawful authority to make such statements. In closing arguments, the State conceded that:

"Lawful authority is something along the lines of, like, if you're in your home somebody breaks into your home and you say "Get out or I'm going to shoot you;" that's lawful authority." RP 336.

Moreover, Robin Stecky did not perceive this statement as a threat to Kill Melody. Robin immediately responded to the defendant's statement by saying "Ditto." Exhibit 2.

"Alleged threats should be considered in light of their entire factual context, including surrounding events and reaction of the listeners." U.S. v. Orozco-Santillan, 903 F.2d 1242, 1265 (1990 9<sup>th</sup> Cir.) (emphasis added)

The State failed to prove beyond a reasonable doubt, that the defendant's statements were true threats or were a 'serious expression of an intent to commit an act of unlawful violence.' Virginia v. Black, 538 U.S. 343, 359 (2003). (emphasis added).

### ADDITIONAL GROUNDS #3

The State failed to prove, beyond a reasonable doubt, the statutory element that the defendant 'by words or conduct place[d] the person threatened in reasonable fear that the threat [to kill] would be carried out.' RCW 9A.46.020(1)(b).

"In order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense." State v. C.G., 150 Wash.2d 604, 80 P.3d 594 @ 598 (2003).

Robin Steeley perceived the defendant's statement that her daughter's life was in danger, (exhibit 4) as a threat to kill. Regardless of whether or not this was a true threat, the defendant's words or conduct did not place Robin Steeley in reasonable fear that this alleged threat would be carried out.

Immediately upon learning that Robin Steeley was perceiving the defendant's voicemail, (Exhibit 4) as a threat to kill Melody Steeley, the defendant immediately sent a text message to Robin Steeley explaining that his voicemail was not a threat to kill Melody and he apologized to Robin for the confusion. RL 267-68, Exhibit 2.

The defendant's statement is a clear and unequivocal statement that the defendant did not intend to threaten life of Melody Steeley and therefore, any fear that Robin Steeley had that a threat to kill would be carried out is unreasonable.

On cross-examination, Robin Steeley was asked:

"Q. Okay. Well, when he responded to your initial text message to him, didn't he clarify to you that he's not threatening; that he's talking about legal consequences that you have to face for stealing, for example: isn't that what he told you?"

"A. It didn't make a whole lot of sense. If you were able to make sense out of that and that's what you got from it, that's okay."

"Q. I'm ask-- I'm asking you if that's what he told you?"

"A. I think that, yeah he tried to backpedal after the message." RP 180.

Robin Steeley's admission here is *prima facie* evidence that the defendant's statement was not intended to place her in fear that a threat to kill would be carried out; in fact, the intent was clearly the opposite. Accordingly, Robin's fear was not reasonable.

Robin's fear was based solely on her failure

to understand the defendant's explicit message that he was not threatening her daughter's life. This fear was exaggerated by the defendant's status as a convicted felon. RP 159-60, 176.

The defendant sent Robin a newspaper clipping from 1998 in which the article states that the defendant was a suspect in several robbery-related crimes. Exhibit 1, Exhibit 2. The article does not mention any convictions, nor does the article mention that the defendant has ever caused physical injury or death. Exhibit 1. The defendant does not comment on, or even mention this article in any of his messages. Exhibit 2. In a message following this article, the defendant states: "I just got done doing 20 years in prison. I don't want your daughter to go down my path, but she chose [a] life that sent her down that path." Exhibit 2. RP 270-72.

It is not reasonable for Robin to believe that the defendant intended to commit multiple murders simply because 20 years prior, the defendant was a suspect in several non-murder-related crimes. To hold otherwise would allow an unreasonable inference that any perceived threat could be elevated to a threat to kill simply because the person is known to be convicted of, or even merely a suspect of, any crime.

For these reasons, the state failed

to prove that Robin Steeley was placed in reasonable fear that the threat to kill would be carried out as required by RCW 9A.46.020(1)(b).

## CONCLUSION

The defendant's statements to Robin Steeley were not true threats. The statements were merely a prediction of violence based on both Melody's and Robin's threats of gunplay. The defendant's communications with Robin were the defendant's desire and attempt to avoid violence, not to threaten it. The defendant's threat of violence was expressly conditional on its use in self-defense, if necessary, and therefore lawful.

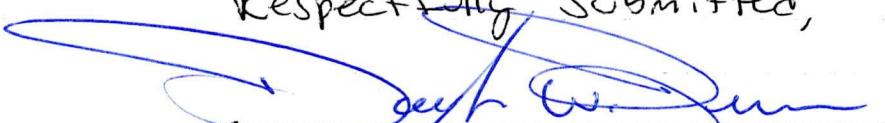
The State failed to prove beyond a reasonable doubt that the defendant's words or conduct placed Robin in reasonable fear that a threat to kill would be carried out. At least twice the defendant expressly eschewed any notion that any of his communications to Robin were intended as a threat to kill Melody or any other person. In both his first text message to Robin and in his last, the defendant clearly states that any violence threatened would only be as a result of his lawful and necessary use of self-defense. Accordingly, the State failed to prove beyond a reasonable doubt that the defendant's communications with Robin Steeley were made without lawful authority.

The trial court excluded evidence relevant to the alleged victim Robin Steeley's credibility.

For these reasons, this Court should vacate the defendant's convictions on Court 1 and Court 2.

Dated: September 7<sup>th</sup>, 2020.

Respectfully Submitted,

  
Douglas W. Dum - Appellant.

Douglas Wayne Dunn  
SID #13060446 - SRCI  
777 STANTON BLVD  
ONTARIO, OR 97914

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September 9, 2020

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RE: STATE v. DUNN, Case No. 54484-9-II  
STATEMENT OF ADDITIONAL GROUNDS

To whom it concerns,

Enclosed, please find a STATEMENT  
of ADDITIONAL GROUNDS for Review. A copy  
has been sent to my attorney at the  
following address:

Maureen Cyr  
Washington Appellate Project  
1511 THIRD AVE, Suite 610  
SEATTLE, WA 98101

Thank you,

Sincerely,



Douglas W. Dunn  
Appellant.

